Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1970

No. 638

ORANNA B. MOOSMAN, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, Deceased,

Petitioner,

v.

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, a body politic and corporate of the United States of America, and PARLEY PROBST,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Brief for Respondent, Ute Indian Tribe of the Uintah and Ouray Reservation, in Opposition.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit (App. III of Petition, p. A-25) and the per curiam opinion on rehearing (App. IV of Petition, p. A-36) are not yet reported. No opinion was rendered by the District Court for the District of Utah, but its Findings of Fact and Conclusions of Law (App. II of Petition, p. A-5) and

Judgment (App. I of Petition, p. A-1) appear in the Appendix of the Petition.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on April 20, 1970. A timely petition for rehearing in banc was denied on June 5, 1970, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 United States Code §1254(1).

QUESTIONS PRESENTED

1. Whether, under the circumstances of this case, the Act of August 27, 1954 (68 Stat. 868, 25 U.S.C. §677 et seq.), conferred upon the Ute Indian Tribe a right to meet the price at which the selling mixed-blood offered land acquired from tribal assets.

2. Whether the Act of August 27, 1954, *supra*, as construed by the Court of Appeals, is contrary to the provisions of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Act of August 27, 1954 (68 Stat. 868, 25 U.S.C. §677 et seq.) and of the regulations involved (25 C.F.R. §243 et seq., 1966 Ed.) are set forth in the Petition Appendix, pages A-60-62, A-63 - A-67, respectively, except Sections 5 and 8 of the Act of August 27, 1954 which were as follows:

> Section 5. Effective on the date of publication the final rolls as provided in section 8 hereof the

tribe shall thereafter consist exclusively of full-blood members. Mixed-blood members shall have no interest therein except as otherwise provided in this Act (68 Stat. 868, 25 U.S.C. §677[d]).

Section 8. The tribe shall have a period of thirty days from the date of enactment of this Act in which to prepare and submit to the Secretary a proposed roll of the full-blood members of the tribe, and a proposed roll of the mixed-blood members of the tribe living on the date of enactment of this Act. If the tribe fails to submit such proposed rolls within the time specified in this Act, the Secretary shall prepare such proposed rolls for the tribe. Said proposed rolls shall be published in the Federal Register, and in a newspaper of general circulation in each of the counties of Uintah and Duchesne in the State of Utah. Any person claiming membership rights in the tribe, or an interest in its assets, or a representative of the Secretary on behalf of any such person, within sixty days from the date of publication in the Federal Register, or in either of the papers of general circulation, as hereinbefore provided, whichever publication date is last, may file an appeal with the Secretary contesting the inclusion or omission of the name of any person on or from either of such proposed rolls. The Secretary shall review such appeals and his decisions thereon shall be final and conclusive. After disposition of all such appeals to the Secretary, and after all transfers have been made pursuant to section 4 hereof the roll of the full-blood members of the tribe, and the roll of the mixed-blood members of the tribe, shall be published in the Federal Register, and such rolls shall be final for the purposes of this Act. (68 Stat. 869, 25 U.S.C. §677[g]).

Sections 5 and 8 were both amended on August 2, 1956 by adding, at the end of Section 5, the following sentence:

> New membership in the tribe shall thereafter be controlled and determined by the constitution and bylaws of the tribe and ordinances enacted thereunder. (70 Stat. 936, 25 U.S.C. §677[d]).

and by adding, at the end of Section 8, the following:

> , but this Act shall not be construed as granting any inheritable interest in tribal assets to full-blood members of the tribe or as preventing future membership in the tribe, after the date of enactment of this Act, in the manner provided in the constitution and bylaws of the tribe. (70 Stat. 936, 25 U.S.C. §677[g]).

Petitioner argues constitutional questions (Petitioner's brief, pp. 18, 19), but fails to state the provisions upon which she relies, either in the argument or as required by Rule 23(d). From the cases cited we assume the Fifth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States are allegedly involved. They are as follows:

AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner's statement of the case contains the opinions and arguments of counsel which will be obvious to the court, but we do not regard a separate statement by respondent as desirable. Since petitioner's statement is partial in its presentation, we deem it necessary to call to the attention of the court only the omissions that have distorted the factual circumstances of the case.

The legislative history shows that the mixed-bloods desired termination of federal supervision. This appears in the following excerpt from House Report No. 2493, 83rd Congress, 2nd Session, 2 U.S. Congressional News (1954), pp. 3355, 3356:

> The action proposed by this bill will permit the mixedbloods to progress toward termination of Federal supervision without being held back by the fullbloods who desire continuation of wardship status. According to testimony from members of the Ute Tribe, the majority of the mixedblood group feel that they are ready for a termination of Federal supervision over their property and the full-

blood Indians believe that they are not ready for such action. (App. IV of Petition, pp. A-36-37).

The Act of August 27, 1954, *supra*, did provide that effective on the date of publication of the final rolls as provided in Section 8 of the Act, the Tribe would thereafter consist exclusively of full-blood members and mixed-blood members would have no interest therein except as otherwise provided in the Act. (25 U.S.C. §677[d]). The final roll of the mixed-blood members of the Tribe was approved by the Secretary of the Interior on March 27, 1956 and published in the Federal Register on April 5, 1956. (21 F.R. 66, App. II of Petition, p. A-18).

Federal supervision over tribal land terminated when the patent issued thereto. (25 C.F.R. §243.2[h], App. XII of Petition, p. A-64).

At the time of the execution of the agreement of October 28, 1959, between Elizabeth and Probst, the regulations had not yet been published, but the law then provided that in the event a member of the mixed-blood group determines to dispose of his interest in any of said real estate at any time within ten years from August 27, 1954, he shall first offer it to the members of the Tribe. (25 U.S.C. §677[n]). Probst was then represented by Attorney Glen M. Hatch and Elizabeth was advised by Attorney R. Earl Dillman.

The Court of Appeals held that Probst, Elizabeth and petitioner, by their actions, deprived the Tribe of a federally created right and that right must be vindicated by offering the Tribe an opportunity to acquire the land. (App. II of Petition, p. A-33).

ARGUMENT

Petitioner's assigned reasons for granting a writ of certiorari are largely based upon a misconception of the holding of the Court of Appeals. The court did not direct an offering of the property at this date. As the trial court observed, because of the impossibility of reconstructing what would have happened had the offer been made as required by law, an offering at this time could not do substantial justice to the parties. The Court of Appeals held that the federally secured right of the Tribe to have the property offered to it before conveyance to third parties had been invaded and the court was, therefore, required to determine what relief the Court of Appeals could fashion to remedy the wrong. It was only because the land was being sold exclusively to mixed-bloods that persons other than mixed-bloods were not allowed to bid upon the property when purchased by Elizabeth. Although Elizabeth was a mixed-blood, her personal interests were adverse to claims that might have been asserted by the mixed-blood group in this action. For this reason she discharged her first attorney when it was learned that he had commenced an action on behalf of the Affiliated Utes, the mixed-blood organization. (*Bumgarner* v. *Ute Indian Tribe*, 417 F.2d 1305, 1307 [1969]). Petitioner now becomes very solicitous of the rights of the mixed-bloods who are not parties to this action simply as a vehicle for argument in this proceeding. Although the Court of Appeals had not ordered an offering, the same attorney the petitioner had discharged filed an Acceptance of Offer to Sell on behalf of the mixed-bloods. Petitioner now inserts in the petition matters that were neither before the trial court nor the Court of Appeals via the Appendix of

the Petition. (App. X of Petition, p. A-35). While we do not desire to dignify this type of procedure, we will respond to the merits of the charge.

Petitioner now asserts that the offer required by §677(n) must be made to the members of the Tribe as contrasted to the Tribe itself; and second, that any such offer must be made to the mixed-blood members. We will discuss both of these arguments advanced.

I

THE DECISION BELOW IS CLEARLY CORRECT.

A. OFFER TO MEMBERS OF TRIBE.

Petitioner asserts that the right to purchase runs to the individual members of the Tribe and not to the body politic or corporate. There is nothing in the statute to prevent the offering to the group as a whole. In fact, the Secretary of the Interior so interpreted the statute in drafting its regulations to which we hereinafter refer. The right of the Tribe to purchase the property for and on behalf of its members seems clear. On this matter the trial court held:

> 33. Purchases of tribal assets of mixed-blood members by the Ute Indian Tribe of the Uintah and Ouray Reservation for and on behalf of its members and such purchases pursuant to offers required by the provisions of Title 25 U.S.C. 677(n) have been approved and sanctioned by the Secretary of the Interior by regulations providing therefore and by a course of practice extending from October 14, 1960, to and including April 8, 1964. (App. II of Petition, p. A-18).

The Court of Appeals held that under the regulations 25 C.F.R. §243.6, the Superintendent was required to notify the Tribe of any offers to sell. It affirmed the action of the trial court in this regard, further noting that two letters from Assistant Secretaries of the Interior stated that the offering required by the Act ran to the Tribe as well as to its members. The court further held that there was no compelling indication that the administrative action was contrary to the intent of Congress. What the members of the Tribe can do individually, they can do collectively, as a Tribe.

B. OFFER TO MIXED-BLOOD MEMBERS.

Petitioner asserts that the construction of the act should allow mixed blood members to bid on purchases if full-blood members are allowed to bid. In support of this position, they savor the soup they so craftily cooked up by pointing to the devastating effect of the Acceptance of Offer to Sell by the mixed-bloods as included in Appendix X of petitioner's Appendix, and in Appendix X to the Petition of the companion case, No. 637, also before this court. The purported offer by the mixed-bloods assumes that Elizabeth has made an offer to the Tribe. Again we refer to the distinction between doing equity in this case and requiring an offer to be made at this late date. The Estate made no offer to the Tribe. That is the reason the Court of Appeals prescribed an equitable remedy. There are no regulations now in effect respecting any such offer. The Court of Appeals simply did equity by permitting the Ute Indian Tribe to purchase the property at the price it should have been offered to the Tribe by Elizabeth. (App. III of Petition, p. A-34).

The mixed-blood members ceased to be members of the Ute Indian Tribe on March 27, 1956, when the final rolls were published in the Federal Register. (25 U.S.C. §677[d]). The Affiliated Utes, an organization of the mixed-bloods, were never a party to this action and made no attempt to intervene until the case had been tried, appealed and the decision of the Appellate Court rendered, notwithstanding the fact that the attorney for the Affiliated Utes was the former attorney for the estate of Elizabeth who had been discharged before the trial by the administratrix because of a possible conflict of interest between the estate and Affiliated Utes. (*Bumgarner* v. *Ute Indian Tribe*, *supra*).

There is an obvious reason behind the enactment of section 15 requiring the offer to members of the Tribe. When the Tribe was required to convey in excess of 27 per cent of its lands in order to satisfy the rights of the mixed-blood members who were leaving the Tribe, drastic changes in tribal operations were imminent, notwithstanding an effort to divide the lands according to its classification. The balance between winter and summer range in the grazing of livestock and between range and forage-producing irrigation lands are both delicate and ever-present problems confronted in the operation of livestock. The right of first refusal was not required when the mixed-blood Indians were dividing the lands between themselves, but when they determined to dispose of lands to other people, the continuing members of the Tribe merited and were afforded the right of first refusal. Since the full-blood Indians who are still to remain as reservation Indians had had their operations drastically affected, Congress required the outgoing mixed-bloods to offer the

Tribe and its members an opportunity to purchase the lands that were being separated from the usual holdings of that Tribe before disposing of them to any non-member. The law did not contemplate any second chance for mixed-blood members to purchase the property again, or any supervision over the Indian selling other than to require that it be first offered to the full-bloods.

The logic of the situation dictates that because an entire reservation was being divided, those Indians not being terminated were being granted by Congress the privilege of "first refusal" whenever a terminated Indian determinated to dispose of his interests in the assets of the reservation prior to the expiration of the ten-year period.

Section 5 of the original Act, which petitioner omitted in the appendix of her Petition, provided:

> Effective on the date of publication of the final rolls as provided in section 8 hereof the tribe shall thereafter consist exclusively of full-blood members. Mixed-blood members shall have no interest therein except as otherwise provided in this Act. (68 Stat. 868, 25 U.S.C. §677[d]).

Petitioner contends there was no right of first refusal, stating:

> Even the Secretary did not anticipate such a right as created by the Court of Appeals, for in the rules he spells out the language that would be placed in all patents and said language is in conflict with the notion of a right of first refusal or right of pre-emption. (Brief of Petitioner, p. 17).

We quote from the appendix of petitioner:

> 25 C.F.R. §243.4 Disposal of interest subsequent to termination of Federal supervision.

"Subsequent to the termination of Federal supervision over the property of a mixed-blood member, as herein defined, and before August 27, 1964, any mixed-blood member may dispose of his interest in any real property, as herein defined, after having provided members of the tribe with an opportunity to meet his sales price or meet the highest bona fide offer received by him, which opportunity shall be referred to as a **'right of first refusal'** in members of the tribe. This shall be a covenant running with the land as to all mixed-blood members and shall be set forth in each deed or other instrument of conveyance in the following language:

> Prior to August 27, 1964, the grantee hereunder shall not dispose of any interest in the property herein conveyed without first offering it to the members of the full-blood and mixed-blood groups of the Ute Indian Tribe of the Uintah and Ouray Reservation in accordance with regulations now or hereafter prescribed by the Secretary of the Interior pursuant to the Act of August 27, 1954 (68 Stat. 868). This provision shall also apply to any successor in interest of such grantee who is also a member of the mixed-blood group as defined in the act, it being the intention of this provision to effectuate the purpose of section 15 thereof." (Emphasis added). (App. XII of Petition, p. A-65).

The Secretary in drafting regulations employed a new definition of tribal members as followed:

> (a) "Full-blood member" means each person whose name appears on the final roll of full-blood members as published in the Federal Register on April 5, 1956 (21 F.R. 66), and such other persons as may be admitted to membership in the tribe after August 27, 1954, in the manner provided in the constitution and bylaws of the tribe.

(b) "Mixed-blood member" means each person whose name appears on the final roll of mixed-blood members as published in the Federal Register on April 5, 1956 (21 F.R. 66).

(c) "Member of the tribe" means all *mixed-blood* and full-blood members as defined in paragraphs (a) and (b) of this section. (Emphasis added) (App. XII of Petition, P. A-63, 64).

The Secretary thus expanded the group to which the offer must be made beyond the members of the Tribe as defined by Congress in section 5 of the Act (25 U.S.C.A. 677[d]), as previously quoted. Congress without ambiguity had already determined that after the publication of the final rolls as provided in the Act, the Tribe should thereafter consist exclusively of full-blood members and mixed-blood members would have no interest therein except as otherwise provided in this Act. The two regulations of the Secretary governing disposal of interest prior to termination and subsequent to termination construed together extended the right of first refusal to the terminated mixed-blood members. (App. XII of Petition, pp. A-64, 65).

The final roll of the mixed-blood members of the Tribe was approved by the Secretary of the Interior on March 27, 1956, and published in the Federal Register on April 5, 1956 (21 F.R. 66). The trial court so found. (App. II of Petition, p. A-18).

The promulgation of the foregoing regulations was on August 11, 1960, after the mixed-bloods had ceased to be members of the Tribe. The Secretary by Section 25 was authorized to issue rules and regulations "necessary to effectuate the purposes of this Act" and by Section 15,

the offer was directed to be made in "such form as may be approved by the Secretary." Congress did not authorize the Secretary to require any offer to anyone except members of the Tribe and by the time the regulations were made, the Tribe consisted exclusively of full-blood members. If the Secretary had authority to require the offer to be made to the mixed-blood former members of the Tribe, notwithstanding the fact they had been terminated from tribal rights by the operation of Section 5 (25 U.S.C. 677 [d]), he would likewise have authority to require the offer to be made to any other group of his selection. But since Section 15 specifically limits the offer to members of the Tribe, the Secretary in requiring an offer to be made to mixed-blood former members of the Tribe defeats the intent of Congress. A South Carolina U.S. District Court in 1966 stated the rule in this regard in the case of *Dreir* v. *Lawrimore*, 257 F.Supp. 659 (1966), *Cert. denied* 389 U.S. 974 (1967). The District Court at page 669 stated:

> The rule that an administrative interpretation of an act is entitled to controlling weight may not be invoked *where the statute is not ambiguous* or where the interpretation was neither continuous nor contemporaneous with the enactment of the statute. *The interpretation must be reasonable and it cannot confer or deny rights inconsistent with the express terms of the statute.* (Emphasis added).

The Court of Appeals for the 9th Circuit had earlier held in the case of *United States* v. *Colfax Grain Growers, Inc.*, 157 F. 2d 633, 635-636 (1946):

> And while it is true that administrative interpretations and regulations are to be accorded great weight by the courts in construing statutes because of the superior knowledge of administrative officers of administrative needs, *we cannot construe a*

> *regulation so as to defeat the intent of Congress* as we think it is expressed in Committee reports herein before quoted. (Emphasis added).

The U.S. District Court for the Western District of Oklahoma in *Continental Oil Company* v. *Jones*, 80 F. Supp. 340, 344 (1948), affirmed 176 F.2d 519 (1949), held:

> A regulation, promulgated by a department of the government pursuant to statutory authority, has the force and effect of law, *unless it is in conflict with an express statutory provision;* and when the regulation is a contemporary construction of the act authorizing it, the construction is entitled to consideration and will not be set aside except for weighty reasons. *U.S.* v. *Public Service Company of Colorado*, 10 Cir., 143 F.2d 79; *Jones* v. *Gaylord Guernsey Farms*, 10 Cir., 128 F.2d 1008; *U.S.* v. *Stanolind Crude Oil Purchasing Company*, 10 Cir., 113 F.2d 194. (Emphasis added).

To extend the offer to persons other than as directed by the statutes is in conflict with both the purpose and express provision of the statute.

Decedent, whose estate the petitioner represents, was a mixed-blood, but she already had an opportunity to purchase the property which she did purchase.

C. COMPETENCY OF ELIZABETH C. BUMGARNER.

Petitioner asserts that on November 11, 1960, when Mrs. Bumgarner entered into the contract circumventing the federal statute, she was plagued with marital problems, had a child who was sick, was drinking heavily and was in need of money. There was no substantial evidence to justify a finding that she was incompetent at the

time she entered into the agreement, and neither court so held. Although the trial court stated that the undisputed evidence says that Probst drew the agreement (R. Vol. II, p. 253), R. Earl Dillman, attorney for Mrs. Bumgarner, testified that he drew the agreement on October 28, 1959 (R. Vol. I, p. 55). This testimony would certainly appear to be true, since on the margin of the exhibit itself is printed "Law Offices of Dillman and Dillman, Roosevelt, Utah." (R. Vol. III, p. 142). Mr. Dillman further testified that he was familiar with Sections 10 and 15 of Public Law 671, Title 25 U.S.C. §677 (i) and §677 (n), (R. Vol. I, p. 55). At the time he drew the instrument pertaining to the sale of the property, the undisputed evidence is to the effect that the agreement of October 28, 1959 was drawn by the attorney for Mrs. Bumgarner. The administratrix cannot now deny responsibility for the knowledge and acts of the attorney of the decedent, done within the scope of his employment. (*Armstrong* v. *Ashley*, 204 U.S. 272 [1907]). Since Mrs. Bumgarner's attorney undertook the responsibility for drawing the October agreement and was familiar with the law which prohibited both the encumbering and sale of the property without the approval of the Secretary of the Interior, or without requirement of an unqualified offer for first refusal by the Tribe, it cannot fairly be said that Mrs. Bumgarner did not consult the attorney about the legality of the agreements. He did purport to advise her with respect to the October agreement: Mr. Dillman knew that any contract made in violation with the section against encumbrance would be null and void. (R. Vol. I, p. 56). He knew Mrs. Bumgarner had not received her patent, (R. Vol. I, p. 57) and wrote it into the contract. (R. Vol. I, p. 57). Nevertheless, he also wrote into the contract that Mrs. Bumgarner would

immediately execute a mortgage unlawfully encumbering the property in question without requiring Secretarial approval. Neither Mr. Dillman nor anyone acting for Mrs. Bumgarner submitted the contract for the approval of the Secretary of the Interior. (R. Vol. I, p. 58). He knew the mortgage was given as security for the money advanced by Probst, according to the contract he had drawn (R. Vol. I, p. 60) and stated that the mortgage may have been drawn at his suggestion. He was not sure, since both Mr. Hatch and Mr. Probst were in the office at the time. (R. Vol. I, p. 61). Mrs. Bumgarner took a copy of the November 11, 1960 agreement into the office of Mr. Dillman (R. Vol. I, p. 61). Mr. Dillman used the instrument as his authority for turning the money over to Mrs. Bumgarner after calling Mr. Hatch at Heber on the telephone and asking him if it was agreeable to release this money from escrow. He then gave to her the check he had been holding. His best recollection was that Mrs. Bumgarner signed the agreement in his office and Mr. Dillman's notary public seal and signature appear thereon. (R. Vol. I, p. 62). Mr. Dillman could not recall whether he went over the terms of the instrument with her, but he assumed that he did. (R. Vol. I, p. 62).

On further cross-examination of Mr. Dillman, he testified with regard to the second agreement (November 11, 1960), which was notarized in his office that Mrs. Bumgarner had brought it to him, that he examined it and a copy of the agreement was kept by him in his file.

To argue that there is nothing in the record upon which the court could find that Mrs. Bumgarner in October 1959 knew and understood that when she determined

to sell the property she was required to offer it to the full-blood members of the Tribe and that if she did not, the contract was illegal and improper, is to hold that she was not responsible for the acts of her attorney who drew the contract providing for the circumvention of the offering process and for the recording of an encumbrance clearly contrary to the provisions of the statute. Sanity and mental capacity of a person signing an instrument are presumed and the burden is on one who alleges the contrary. (*Clelland v. Peters*, 73 F. Supp. 769, 771 [W. D. Penn. 1947]). Financial pressure does not justify a fraud. There is no evidence whatever that Mrs. Bumgarner was under the influence of liquor at the time she signed either agreement or when she received the cash benfits of those agreements. On the contrary, the evidence shows that she was on the committee for the mixed-blood group effecting the division of the assets of the reservation and signed Plaintiff's Exhibit 16 in agreement after such division had been accomplished. (R. Vol. II, p. 192A).

In the claim Probst submitted to the Estate (App. VIII of Petition p. A-49), the administratrix was given one alternative, among others:

> (a) That the land be offered in accordance with the agreement and Federal law, and in the event that the same is not sold pursuant to such offering, that the same be forthwith conveyed to Claimant. If bids are made at the time of the offering Claimant demands the rights assured him under the contract to buy the same at a higher figure than the bid.

The petitioner failed to make any offer, waiting to convey the property until after the period requiring the offer had

expired. It is under this state of facts that the Court of Appeals held, (App. IV of Petition, p. A-37):

> The facts are that no one asked for the approval of the Secretary and that the machinations of Probst, Elizabeth and Oranna delayed the execution of the deed until after the ten year period. Elizabeth determined to sell to Probst in October 1959, and made a $9,000.00 profit on the sale. We are concerned with the rights of the Tribe. The failure of Probst, Elizabeth and Oranna to seek the approval of the Secretary and to offer the land to the Tribe cannot defeat the right of the Tribe.

All mixed-bloods were given an opportunity to purchase the property at a lower price when it was purchased by Elizabeth. To deny the full-blood members the opportunity to purchase the land at the price for which Elizabeth offered it would not only circumvent the express purpose of the statute, but would leave a grevious wrong unremedied.

II

THERE IS NO IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW

Petitioner asserts to be unconstitutional the very Congressional Act which authorized the division of tribal assets and enabled the person whose estate she represents to purchase the property, subject of this litigation. Petitioner cites *Hirabayashi v. United States*, 320 U.S. 81 (1942), and *Levy* v. *Louisiana*, 391 U.S. 68 (1968), as authority for her assertion. The *Levy Case, supra*, deals exclusively with the Fourteenth Amendment of the Constitution of the United States which is restricted in its appli-

cation only to the states and, therefore, can have no bearing upon the case at bar.

The *Hirabayashi Case, supra,* however, interprets a federal statute within the context of the Fifth Amendment of the Constitution of the United States. We assume petitioner's assertion must rest upon the "due process" clause of the Fifth Amendment. It appears petitioner's chief complaint is founded upon the first refusal right given to tribal members to the exclusion of the mixed-bloods, rather than any personal right she asserts in the case at bar.

The Act of August 27, 1954, *supra,* by terminating the wardship status of the mixed-blood group, enabled each individual mixed-blood to receive his pro rata share of reservation assets, subject only to interim federal supervision. On the other hand, the remaining members of the Tribe received no such distribution of reservation assets, but continued in their existing relationship with the United States Government and tribal ownership of property. In consideration of the right of first refusal remaining with the full-blood members of the Tribe, the individual mixed-bloods obtained a per capita distribution of their share of reservation assets.

Upon rehearing before the Court of Appeals, the constitutional issue was considered upon its merits. The summary and conclusions of the Court succinctly states the position of this respondent:

> Oranna asserts that the Termination Act, 25 U.S.C. §677 et seq., as construed and applied is unconstitutional because it denies due process to the mixed-bloods in that the enforcement of the

first-refusal right of the Tribe arbitrarily and capriciously discriminates against the mixed-blood group. The theory appears to be that, because of the economic situation of the mixed-bloods and because of their continuing need for federal supervision, the protective provisions of the Act are for their benefit and the use of those provisions for the benefit of the Tribe is an unreasonable classification which denies equal protection.

The record contains no evidence of their economic condition or need for continued supervision. The legislative history shows that the mixed-bloods desired termination of federal supervision. This appears in the following excerpt from House Report No. 2493, 83rd Cong. 2d Sess., 2 U.S. Cong. News '54, 3355, 3356:

> "The action proposed by this bill will permit the mixedbloods to progress toward termination of Federal supervision without being held back by the fullbloods who desire continuation of wardship status. According to testimony from members of the Ute Tribe, the majority of the mixedblood group feel that they are ready for a termination of Federal supervision over their property and the fullblood Indians believe that they are not ready for such action."

Although the Fifth Amendment does not contain an equal protection clause as does the Fourteenth Amendment, which applies to the states, discrimination may be so unjustifiable as to violate due process. Bolling vs. Sharpe, 347 U.S. 497, 499. In the case at bar the classification into two groups was supported by the Indians, was relevant to the purposes of the legislation, and had a reasonable basis. We find no arbitrary or capricious discrimination which violates Fifth Amendment due process. See Detroit Bank v. United States, 317 U.S. 329, 337-338.

CONCLUSION

From the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated this 28th day of September 1970.

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